U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: APR 27 2005

WAC 02 133 51047

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER: [redacted]

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INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded for further consideration.

The petitioner is a care facility. It seeks to employ the beneficiary permanently in the United States as a residence supervisor. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on May 27, 1997. The proffered wage as stated on the Form ETA 750 is $2,060 per month or $24,720 annually.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner, through counsel, submitted a copy of the owner's 2000 Form 1040, U.S. Individual Income Tax Return, including Schedule C, Profit or Loss From Business. The 2000 Form 1040 reflected an adjusted gross income of $84,999 and Schedule C reflected gross receipts of $78,000, wages paid of $0, net profit of -$6,558, and cost of labor of $27,600.

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on April 29, 2002 and on August 5, 2002, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited

financial statements to demonstrate its continuing ability to pay the proffered wage from the priority date of May 27, 1997 through 2001. The director also specifically requested that the petitioner provide copies of its Forms DE-6, Quarterly Wage Reports, for all employees for the last four quarters that were accepted by the State of California, and copies of original computer printouts from the Internal Revenue Service (IRS) for the years 1997 through 2001. It is noted that the director failed to request the petitioner's household expenses, and since the petitioner is a sole proprietor, to inform the petitioner that he may provide additional evidence of the ability to pay the proffered wage to include bank statements, CD's, etc.

In response, the petitioner submitted complete copies of the owner's 1997 through 2001 Forms 1040, U.S. Individual Income Tax Returns, including Schedule C, Profit or Loss from Business; copies of Forms W-2. Wage and Tax Statements, in lieu of Forms DE-6, for the years 1998 through 2000; and copies of the original IRS computer printouts for the years 1997 through 2001. The 1997 tax return reflected an adjusted gross income of $74,096, and Schedule C reflected gross receipts of $81,100, wages of $0, net profit of $831, and cost of labor of $14,215. The 1998 tax return reflected an adjusted gross income of $85,501, and Schedule C reflected gross receipts of $68,828, wages of $0, net profit of $3,845, and cost of labor of $21,030. The 1999 tax return reflected an adjusted gross income of $33,258, and Schedule C reflected gross receipts of $51,928, wages of $0, net profit of -$6,060, and cost of labor of $14,855. The 2001 tax return reflected an adjusted gross income of $73,424, and Schedule C reflected gross receipts of $95,400, wages paid of $0, and net profit of $19,108. The Forms W-2 show that the beneficiary did not work for the petitioner in 1997 through 2001. The 1997 through 2001 computer printouts confirmed the petitioner's adjusted gross incomes in the years 1997 through 2001.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on December 5, 2002, denied the petition.

On appeal, the petitioner, through counsel, submits previously submitted documentation; a copy of a petition approved on September 19, 2000; copies of the Department of Health and Human Services (HHS) poverty guidelines for the years 1997 through 2001; copies of the petitioner's 2002 and 2003 Forms 1040, U.S. Individual Income Tax Returns, including Schedule C, Profit or Loss from Business; a copy of a 2002 Federal Depreciation Schedule for Silver Lake Property; and a statement of the petitioning owner's personal assets and liabilities. The 2002 tax return reflected an adjusted gross income of $18,371, and Schedule C reflected gross receipts of $76,800, wages of $0, net profit of $10,108, and cost of labor of $12,000. The 2003 tax return reflected an adjusted gross income of $57,843, and Schedule C reflected gross receipts of $49,500, wages of $0, and net profit of -$851.

Prior counsel states:

> The service erred in its denial of the petition because the Petitioner has the ability to pay the proffered wage to the Beneficiary. The proper consideration of the Petitioner's ability to pay the proffered wage should include the amount deducted as depreciation. Petitioner's income is more that [sic] sufficient to support a family of 4 members. The INS failed to take into

consideration the effect the Beneficiary will have on the Petitioner's ability to pay the proffered wage.

* * *

A comparison of the federal poverty guidelines to the Petitioner's income, demonstrates that the Petitioner's remaining income is significantly above the poverty level and is more than sufficient to support a family of 4 members.

Furthermore, the Service failed to take into consideration the effect the Beneficiary will have on the Petitioner's ability to pay the proffered wage. The United States Court of Appeals for the District of Columbia Circuit held that "the INS's interest in the income statement appears to assume that the worker will contribute nothing to income. This seems wholly unrealistic; one would expect an employer to hire only workers whose marginal contribution to the value of the company's production equals or exceeds their wages." Masonry Masters, Inc., 277 U.S. App. D.C. 341, 875 F.2d 898. Therefore, the Service must take into consideration the effect additional staff will have on the Petitioner's ability to pay the proffered wage. The additional staff will contribute to the business by allowing more elderly residents to be accepted by the Petitioner's retirement Home. The additional clients generated by new staff should result in further expansion by the Petitioner, thereby increasing the Petitioner's net income.

Current counsel argues:

The Service Centers have sought clarification in handling Form I-140s and the "Ability to Pay" issue, as it is a major contributing factor to the backlogs of petitions and unnecessary Requests for Evidence. On May 4, 2004, William Yates issued a second Memo addressing the issue and instructing adjudicators on when to grant or deny an I-140 petition based on a Petitioner's ability to pay. Memorandum by William R. Yates, Associate Director of Operations, "Determination of Ability to Pay Under 8 C.F.R. § 204.5(g)(2)," HQOPRD 90/16.45 (May 4, 2004).

* * *

In the present matter, Petitioner's net current assets for the relevant years far exceed the proffered wage. The proffered wage is $26,780 per year. Diamond's net current assets far exceed the proffered wage for the relevant years (varying up to 1.5 million over the course of the relevant years). Diamond Care alone is worth approximately $650,000. Please see attached. Diamond also owns 'Silverlake Properties' as indicated on the Schedule E and Depreciation Schedule. This property's value is $158,000 and is listed as an asset from 1997 through present. Therefore, Petitioner's net current assets are greater than or equal to the proffered wage.

* * *

Petitioner has additional assets (e.g. stock, intangible assets, etc.). Please see assets listed as a Merrill Lynch Trust Account as example (Form 1099-R Pensions and Annuities Summary). However, the real estate alone far exceeds the proffered wage.

* * *

Moreover, the 2004 Financial Ability to Pay Memo should have implemented ability to pay principles established at the Eastern Service Center (ESC)/AILA Liaison Teleconference of November 16, 1994 (Liaison Minutes), where the then-Director of the Service Center offered means to determine a petitioner's ability to pay.

* * *

As noted above, the Service may consider the proprietor's personal assets and liabilities. Petitioner has submitted his/her individual tax returns as evidence of personal assets and liabilities. In addition, Petitioner has submitted their most recent Statement of Assets, Liabilities and Equity (October 31, 2004). As indicated on the Statement, the total assets are $1,963,000.00 and the excess of assets over liabilities is $1,517,000.00. Clearly, the individual assets indicate the ability to pay the proffered wage.

* * *

Therefore, based on the May, 2004 Yates Memo, the 1994 Liaison Minutes, recent case law and the evidence previously submitted, and the evidence contained herein, Petitioner has the ability to pay Mr [redacted] the proffered wage from the priority date until present.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it had employed or paid the beneficiary a salary equal to or greater than the proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than $20,000 where the beneficiary's proposed salary was $6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor supported a family of four. In 1997 through 2003 after paying the beneficiary's salary ($24,720) the petitioner would have had $49,376, $60,781, $8,538, $60,279, $48,704, -$6,349, and $33,123, respectively, remaining to support a family of four. As the petitioner failed to provide a statement of monthly expenses for the years 1997 through 2003 (again, it is noted that the director failed to request this information), the AAO cannot determine if the petitioner was able to pay the proffered wage and his household expenses with the remaining incomes.

Counsel urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), in support of this assertion. Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage. Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a residence supervisor will significantly increase profits for a retirement home. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

Counsel states that a comparison of the federal poverty guidelines to the petitioner's income, demonstrates that the petitioner's remaining income is significantly above the poverty level and is more than sufficient to support a family of four members. However, the AAO does not recognize the Poverty Guidelines, issued by the Department of Health and Human Services, as an appropriate guideline to a petitioner's reasonable living expenses, and, therefore, will not consider them when determining the ability to pay the proffered wage. The poverty guidelines issued by the Department of Health and Human Services are used for administrative purposes — for instance, for determining whether a person or family is financially eligible for assistance or

services under a particular Federal program. The only time CIS uses the poverty guidelines is in connection with Form I-864, Affidavit of Support.[1]

Counsel points to a statement of the petitioner's assets and liabilities as proof that the petitioner has the ability to pay the proffered wage. However, the petitioner has provided no verifiable evidence of those assets and liabilities.

Counsel also states that the value of property (Silverlake Properties) owned by the petitioner is proof of its ability to pay the proffered wage. However, property is considered to be a long-term asset (having a life longer than one year) and is not considered to be readily available to pay the proffered wage to the beneficiary. The unambiguous language of the regulation at 8 C.F.R. § 204.5(g)(2) clearly indicates what the basic evidentiary standard is to determine the ability to pay. There is nothing to indicate that the three basic evidentiary forms outlined in the regulation, e.g., federal tax forms, annual reports, and audited financial statements, are to become secondary or tangential evidence. Rather, the regulations clearly state that in "appropriate cases" CIS might request or a petitioner might submit additional evidence such as bank accounts, profit/loss statements, or personnel records. What is required is verifiable evidence that supports the entire record. In any event, counsel fails to cite any specific case, memorandum, or other authoritative CIS determination that such an alternative method of calculating ability to pay is acceptable. Furthermore, unless the source the petitioner would cite is a binding precedent decision, it will not be considered. *See* 8 C.F.R. § 103.9(a).

Counsel cites "Minutes of ESC/AILA Liaison Teleconference, Nov. 16, 1994, reprinted in AILA Monthly Mailing 44, 46-47 (Jan. 1995)" (AILA minutes) where the then-Director of the Service Center offered means to determine a petitioner's ability to pay. Counsel's reliance on the AILA minutes is misplaced. The determinative principle simply turns on the point that letters and correspondence issued by offices of CIS are not binding on the AAO. The minutes of the AILA Liaison Teleconference does not constitute official CIS policy and will not be considered as such in the adjudication of petitions or applications. Although such minutes may be useful as an aid in interpreting the law, they are not binding on any CIS officer as they merely indicate the writer's analysis of an issue.

Counsel points to several non-precedent decisions in support of his contention that the petitioner has the ability to pay the proffered wage. While 8 C.F.R. § 103.3(c) provides that precedent decisions of Citizenship and Immigration Services (CIS), formerly the Service or INS, are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Counsel further cites a memorandum fro[redacted] addressing the issue and instructing adjudicators on when to grant or deny an I-140 petition based on a Petitioner's ability to pay. Memorandum by [redacted] Associate Director of Operations, "Determination of Ability to Pay Under 8 C.F.R. § 204.5(g)(2),"

[1] The Affidavit of Support is utilized at the time a beneficiary adjusts or consular processes an approved immigrant visa to provide evidence to CIS that the beneficiary is not inadmissible pursuant to section 212(a)(4) of the INA as a public charge. The beneficiary in this matter has not advanced to a consular processing or adjustment of status phase of the proceeding.

HQOPRD 90/16.45 (May 4, 2004). However, in the instant case, the evidence provided does not meet the criteria stated in the memorandum. First, the petitioner's adjusted gross income in 2002 was not greater or equal to the proffered wage in every pertinent year. Second, even though counsel states that the petitioner's net current assets are greater than the proffered wage, counsel has provided no verifiable evidence of his assertion. Moreover, counsel seems to blur the distinction between all assets and net current assets. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Third, the petitioner did not employ the beneficiary in 1997 through 2003, and, therefore, the beneficiary's paid salary was not greater than or equal to the proffered wage.

The record of proceeding does not contain any other evidence or source of the petitioner's ability to pay the proffered wage from 1997 and continuing to the present. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The director must afford the petitioner reasonable time to provide evidence pertinent to the issue of the petitioning owners' household expenses, to provide verifiable evidence of its current assets and liabilities, to provide evidence of additional resources with which to pay the proffered wage such as bank accounts, CDs, etc., and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's December 5, 2002 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.